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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)

I. Introduction

1. At its fiftieth session, the Commission had before it notes by the Secretariat on "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration" (A/CN.9/915); on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916), and on "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)" (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on the investor-State dispute settlement (ISDS) framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of ISDS. In line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

3. At its thirty-fourth and thirty-fifth sessions, the Working Group considered possible reform of ISDS on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and submissions from Intergovernmental Organizations (A/CN.9/WG.III/WP.143). The deliberations and decisions of the Working Group at

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264.

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the thirty-fourth session were set out in document A/CN.9/930/Rev.1, A/CN.9/930/Rev.1/Add.1 and at the thirty-fifth session, in document A/CN.9/935.

4. At its fifty-first session, the Commission took note of the discussions of the Working Group, which had focused on the first phase of its mandate (to identify and consider concerns regarding ISDS). The Commission welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent. The Commission noted the engagement of the Working Group, and of the Secretariat, with diverse stakeholders, including intergovernmental organizations such as the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), the International Centre for the Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA).[2] At that session, the Commission also expressed its appreciation for the provision of information by various stakeholders to assist the Working Group in its deliberations, as well as for proposals by an academic forum and a group of practitioners to make information from their research and experience available to the Working Group.[3]

5. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. The Commission noted that the Working Group would continue its deliberations pursuant to the mandate given to it, allowing sufficient time for all States to express their views, but without unnecessary delay.[4]

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its thirty-sixth session in Vienna from 29 October to 2 November 2018. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mauritania, Mauritius, Mexico, Namibia, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Albania, Algeria, Bahrain, Belgium, Benin, Burkina Faso, Central African Republic, Costa Rica, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Egypt, Finland, Gabon, Georgia, Guinea, Iceland, Ireland, Kyrgyzstan, Latvia, Madagascar, Mali, Morocco, Myanmar, Netherlands, New Zealand, Paraguay, Peru, Portugal, Senegal, Serbia, Slovakia, South Africa, Sudan, Sweden, Togo, Uruguay, Uzbekistan and Viet Nam.

8. The session was also attended by observers from the Holy See and the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organizations*: Central American Court of Justice (CACJ), Commonwealth Secretariat, Energy Charter Conference, OECD,

[2] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), paras. 140 and 143.
[3] Ibid., para. 144.
[4] Ibid., para. 145.

Organisation Internationale de la Francophonie (OIF), Organization of the Petroleum Exporting Countries (OPEC) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Africa World Institute (IAM), African Center of International Law Practice (ACILP), American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Asian Academy of International Law (AAIL), Asociación Americana de Derecho Internacional Privado (ASADIP), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Legal Studies (CILS), Centre for International Environmental Law (CIEL), Centre for International Governance Innovation, Centre for International Law (CIL), Centre for Research on Multinational Corporations (SOMO), Centre of Excellence for International Courts (ICOURTS), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), Client Earth, Columbia Centre on Sustainable Investment (CCSI), Corporate Counsel International Arbitration Group (CCIAG), Eurasian Economic Commission (EEC), European Federation for Investment Law and Arbitration (EFILA), European Federation for Transport and Environment (T&E), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Friends of the Earth International (FOEI), Geneva Center for International Dispute Settlement (CIDS), Georgian International Arbitration Centre (GIAC), Institute for Transnational Arbitration (ITA), Instituto Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), International Trade Union Confederation (ITUC), Korean Commercial Arbitration Board (KCAB), Moot Alumni Association (MAA), New York International Arbitration Center (NYIAC), Pluricourts, Queen Mary University of London School of International Arbitration (QMUL), Russian Arbitration Association (RAA), South Centre (SC), Swiss Arbitration Association (ASA), Law Association for Asia and the Pacific (LAWASIA), Vienna International Arbitration Centre (VIAC) and World Economic Forum (WEF).

10. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

11. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.III/WP.148); (b) note by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS)" (A/CN.9/WG.III/WP.149) as well as notes by the Secretariat respectively on consistency and related matters (A/CN.9/WG.III/WP.150), on ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS (A/CN.9/WG.III/WP.151), on arbitrators and decision makers (appointment mechanisms and related issues) (A/CN.9/WG.III/WP.152) and on cost and duration (A/CN.9/WG.III/WP.153); and (c) submission by the Government of the Republic of Korea providing a summary of the intersessional regional meeting on ISDS reforms (A/CN.9/WG.III/WP.154).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered agenda item 4 on the basis of documents referred to in paragraph 11 above. The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV.

IV. Possible reform of investor-State dispute settlement (ISDS)

A. General remarks

Inter-sessional Regional Meeting and assistance by informal groups

14. Before engaging in substantive deliberations, the Working Group was updated of the discussions during the fifty-first session of the Commission (see para. 4 above) and heard an oral report of the first Inter-sessional Regional Meeting on ISDS Reform (10 and 11 September 2018, Incheon, Republic of Korea). The Meeting had provided the opportunity to raise awareness in the Asia-Pacific region of the current work of the Working Group and to share experiences and views on the ISDS regime, as reflected in document A/CN.9/WG.III/WP.154. The Working Group expressed its appreciation to the Government of the Republic of Korea and the Secretariat for organizing the Meeting and it was suggested that intersessional meetings in other regions could also be beneficial.

15. Upon request by the Commission at its fifty-first session,[5] the Working Group also took note of information on interaction between the Working Group and the Academic Forum as well as the Practitioners Group, which had been set up as informal groups aimed at making constructive contributions to the ongoing discussions on possible ISDS reform.[6]

General statement

16. The Working Group heard a general statement underlining the importance of improving the global investment environment in a way that encouraged fairness and promoted investment policies in line with the three pillars of sustainable development. It was stated that, appropriate investment policies, including transparent and fair ISDS regimes, were key components of the investment environment, and that discussions on the concerns and possible reforms of ISDS were of central importance to developing States that adopted such regimes. In that context, it was said that any dispute settlement regime should appropriately address the rights and obligations of foreign investors and that the right to regulate and the flexibility of States to protect legitimate public welfare objectives should be respected. The necessity of a multilateral spirit in the discussions was emphasized. It was further said that the effectiveness and legitimacy of such process rested on the active and wide participation of both developing and developed States to present their experiences and views on the direction and content of any possible reform.

Implementation of the mandate

17. Recalling the mandate given to it by the Commission (see para. 2 above), the Working Group considered the organization of its deliberations at the current session. The Working Group noted that, at its previous sessions, it had sought to identify concerns in the field of ISDS, in accordance with the first phase of its mandate. It was further noted that the current session would therefore be devoted to considering and reaching a decision on whether reforms were desirable in light of those identified concerns, implementing the second phase of its mandate. It was, however, stressed

[5] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 144.

[6] Additional information on the Academic Forum and the Practitioners' Group is available at the UNCITRAL website (https://uncitral.un.org/en/library/online_resources/investor-state_dispute).

that this would not preclude the identification of any additional concerns that might need to be addressed by the Working Group as it made progress.

18. It was stated that, in considering the desirability of reforms, the objective for the Working Group would be to decide whether some types of reform would be desirable to respond to specific concerns that had been identified. It was generally felt that the Working Group should tackle the identified concerns individually and consider whether reforms would be desirable to address such concerns (including whether there were options available to address the concerns). It was also stated that it would be premature to engage in discussion regarding which type of reform would be preferable and which solutions would need to be developed, both of which would form the third phase of the mandate of the Working Group.

19. It was emphasized that the Working Group would need to further plan its organization of work prior to embarking in phase three of its mandate. It was stated that, if the Working Group concluded that it would be desirable to undertake reforms, it would then consider how to address those concerns, including for example, questions with respect to priority to be given, sequencing of the deliberations, the possibility of multiple tracks, coordination with other international organizations, and inter-sessional work. In that context, the role of governments in proposing options and solutions as well as the workplan of the Working Group was highlighted.

20. Emphasizing the need to clearly distinguish the current phase of work from phase three where solutions would be sought, it was suggested that the Working Group might wish to develop criteria for considering the "desirability" of reform (for example, whether the identified concerns were well-founded, whether they were serious enough to justify reforms, and whether UNCITRAL would be the appropriate forum to provide the solutions). It was stated that an in-depth analysis of these criteria would facilitate constructive discussion when the Working Group eventually discussed possible reform options as part of implementation of phase three of the mandate. There was some support for the Working Group discussing the criteria to be used in considering the desirability of reform. With respect to the criteria on whether UNCITRAL was the appropriate forum, it was clarified that the question being posed was whether UNCITRAL would be the appropriate body to implement the solutions and not whether UNCITRAL was the appropriate body where discussion should take place.

21. In response, it was mentioned that determination of desirability should be made based on views expressed by individual States in accordance with their own respective criteria, which would vary depending on their experience with ISDS. It was stressed that it would be preferable to leave it to each State to express its views, in light of its own criteria. The Working Group decided to proceed in that manner.

22. It was suggested that document A/CN.9/WG.III/WP.149, which summarized the possible causes and prevalence as well as the seriousness of the concerns could provide a sound basis for the discussion. It was mentioned that the concerns have been presented as falling into three broad categories (those pertaining to lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; those pertaining to arbitrators and decision makers; and those pertaining to cost and duration of ISDS cases) for ease of deliberation. It was generally felt that such categorization was a useful pragmatic basis for moving the discussion forward, while views were also expressed that issues within the different categories were often interlinked and that when considering possible options, the Working Group should not be bound by the concerns as broadly categorized. It was also stated that concerns about legitimacy related to all three categories of concerns and that the concerns, as categorized, should not limit how the Working Group would address possible reforms.

23. It was further suggested that the Working Group, in considering the desirability of reforms, should distinguish concerns that were based on facts and those that were based on perception, understanding that both types of concerns deserved attention. However, it was also stated that there was no merit in making distinction between

such concerns at the current phase as they were closely linked with the legitimacy of the ISDS regime as a whole.

24. It was also mentioned that document A/CN.9/WG.III/WP.149 included reform options that had been presented during the previous deliberations of the Working Group to illustrate the wide range of possible solutions. It was said that the options were presented to facilitate the discussion of the Working Group on the desirability of reforms. It was emphasized that those options were not exclusive nor was the list of options exhaustive.

B. Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

25. The Working Group undertook its consideration of whether the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals were concerns that warranted some form of reform, on the basis of documents A/CN.9/WG.III/WP.149 (paras. 9 and 10), A/CN.9/WG.III/WP.150 and A/CN.9/915.

26. During its deliberation, the attention of the Working Group was drawn to an IBA report titled "Consistency, efficiency and transparency in investment treaty arbitration", which outlined specific questions regarding consistency and efficiency, including potential solutions.

1. Divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency

27. The Working Group first considered concerns relating to divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency.

28. The Working Group recalled its previous discussion where the importance of a coherent and consistent ISDS regime providing for correct and predictable outcomes was highlighted as enhancing confidence in the investment environment and legitimacy of the ISDS regime. The Working Group had noted that different factors might lead to different arbitral decisions (for example, the rules of treaty interpretation required a tribunal to consider more than the ordinary meaning to be given to the terms of a treaty provision when interpreting it, the manner and the extent to which relevant evidence were presented, and how disputing parties made their arguments). The Working Group further recalled that a distinction had been made between divergence in decisions that could be justified and differing interpretations which could not be justified (for example, contradictory interpretations of the same substantive standard in the same treaty, or of the same procedural issue, particularly when the facts were similar). It was recalled that the Working Group had agreed to focus its discussion on those scenarios in which different interpretations could not be justified.

29. In response to a suggestion that the questions of consistency, coherence, predictability and correctness of arbitral decisions deserved a more in-depth analysis, it was clarified that the focus of the discussion should be on whether the overall situation as illustrated in document A/CN.9/WG.III/WP.150 raised concerns that made reforms desirable, and not on specific examples of divergent treaty interpretations. It was further mentioned that the examples presented in that document were illustrative and not exhaustive. It was said that States were invited to conduct more in-depth analysis of those examples. It was further said that some States had conducted such an analysis and had concluded that some, but not all, of the examples were instances of unjustifiable inconsistency.

30. Views were expressed that the lack of consistency, coherence, predictability and correctness of arbitral decisions was a material concern and not only one of

perception. It was said that such a lack negatively affected the reliability, effectiveness and predictability of the ISDS regime and its overall credibility and legitimacy. The view was expressed that this would run contrary to fostering foreign direct investment to achieve the Sustainable Development Goals. It was further mentioned that the lack of consistency could also have financial and political impact on States as they relied on a coherent and predictable framework when developing their investment policies. Further, investors would also be affected when deciding whether to invest in a State and whether to pursue an ISDS claim.

31. It was said that concerns were particularly acute when different ISDS tribunals had reached contradicting conclusions about the same or similar substantive standard or about the same procedural issue, particularly when the facts were similar or a different outcome could not be justified. It was indicated that document A/CN.9/WG.III/WP.150 provided some examples where inconsistent decisions by tribunals were viewed as problematic.

32. It was indicated that the concerns also related to annulment as well as recognition and enforcement of arbitral awards, as these procedures have also given rise to inconsistent approaches and outcomes. The distinction between procedures involving ICSID and non-ICSID awards was underlined. While ICSID awards were subject to annulment procedures under the ICSID Convention, arbitral awards rendered in non-ICSID arbitrations were subject to set aside and enforcement procedures in national courts.

33. It was suggested that it might be useful to identify the causes or sources leading to the lack of consistency, coherence, predictability and correctness of arbitral decisions in order to develop any possible solution. In that light, it was mentioned that substantive protection standards were found in different sources of law, including investment treaties and domestic investment laws, which resulted in fragmentation. It was further pointed out that investment disputes were being resolved by tribunals constituted ad hoc for solving individual disputes.

34. Further, it was suggested that the discussion should not focus on inconsistency among decisions but on ensuring the correct interpretation of investment treaty provisions. It was explained that the main concern was not that decisions were inconsistent, but that arbitral tribunals had interpreted the treaty provisions incorrectly, sometimes not taking account of the intention of the treaty parties. It was said that in considering any reform options, it would be important to consider their possible impact on States' control over their treaties. It was also questioned whether procedural reform alone could address the question of inconsistency and unpredictability.

35. The view was expressed that the divergent interpretations and procedural inconsistency were intrinsic elements of the ISDS regime and further linked with other concerns, for instance, that arbitrators did not regard themselves as under a general duty towards an international system of justice, to act in the public interest, or to take into account the rights and interest of non-disputing parties. It was further said that related questions included how the mandate of arbitrators and their powers were determined and what limitations should apply to their decision-making and interpretative powers. It was further suggested that the concerns under consideration were closely linked to the efficiency of ISDS.

36. Diverging views were expressed on the level of priority to be accorded to these concerns about unjustifiable inconsistency. Some considered that addressing these concerns was of utmost priority while others expressed the view that it was of less priority and required a long-term approach.

37. The Working Group heard examples of how States were currently addressing these concerns in their investment treaties, such as including provisions on joint interpretative declarations, providing more guidance to arbitral tribunals on the meaning of certain terms and standards, and establishing joint committees on treaty interpretation.

38. However, it was suggested that while these approaches were useful for the interpretation of a specific treaty, they did not constitute solutions for interpreting similar treaty provisions in different treaties. The importance of addressing these matters at a multilateral level was underlined. Therefore, it was said that there would be merit in discussing the options at UNCITRAL.

Decision by the Working Group

39. The Working Group completed its discussion with respect to divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency. During its discussion, the Working Group was guided by the distinction made in its previous work between divergent interpretations that were justified and those that could not be justified, and its agreement to focus its discussion on the latter (see para. 28 above). There was consensus in the Working Group that there were instances of unjustifiable inconsistency.

40. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address the concerns related to unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals.

2. Lack of a framework to address multiple proceedings

41. The Working Group considered concerns relating to the lack of a framework to address multiple proceedings, and whether such concerns warranted some form of reform. The Working Group recalled that that matter had been on the agenda of the Commission since its forty-sixth session, in 2013. It was noted that document A/CN.9/915 outlined the causes and impact of concurrent proceedings, existing principles and mechanisms to address concurrent proceedings in international arbitration and possible future work in that area.

42. At the outset, it was mentioned that multiple proceedings resulting in divergent interpretation by ISDS tribunals was one of the reasons leading to the lack of consistency as previously discussed. It was mentioned that multiple proceedings distorted the balance of rights and interests of relevant stakeholders and raised other concerns as identified below.

43. It was suggested that it would be necessary for the Working Group to have a shared understanding of what was meant by multiple proceedings. For example, it was mentioned that it could be broader than concurrent or parallel proceedings encompassing successive proceedings. It was said that circumstances leading to multiple proceedings were varied, including situations where various parties, claiming in various forums and under different sources of law, sought substantially the same relief for the same measure and situations where a State faced multiple claims from unrelated investors in relation to the same measure. Furthermore, acceptance by arbitral tribunals of claims for reflective loss raised by shareholders was another instance leading to multiple claims in investment arbitration. Reference was made to work undertaken by OECD in that respect.

44. In addition, it was pointed out that an investor might pursue its claim on different legal bases, including investment treaties and contracts, as well as in different forums, including State courts, domestic arbitration, international arbitration either institutional or ad hoc. In light of the various situations, it was questioned whether relevant discussion should be limited to multiple ISDS proceedings arising under investment treaties.

45. It was recalled that, at its thirty-fourth session, the Working Group decided to focus on treaty-based ISDS and later consider the possibility of extending the results of its work to ISDS arising under contracts and investment law (see document A/CN.9/930/Rev.1, paras. 27-30). However, it was stated that concerns relating to the lack of a framework to address multiple proceedings were not limited

solely to claims under investment treaties and divergent interpretation of provisions therein. The lack of a framework also had an impact on the overall cost and duration of ISDS proceedings. It was generally felt that the concerns identified were not merely limited to treaty-based ISDS.

46. In an effort to further identify the concerns, it was pointed out that not all multiple proceedings were problematic and in that context, the right of access to justice was underlined. It was suggested that the discussion should focus on problematic situations where the multiplicity of proceedings resulted in a State having to defend several claims in relation to the same measure, with possibly the same economic damage at stake, leading to a duplication of efforts, additional costs, procedural unfairness and potentially contradictory outcomes. It was further said that there were examples of multiple proceedings involving entities within the same corporate structure that had given rise to multiple recovery of the same damage and created dissatisfaction among users of ISDS. It was also said that multiple proceedings undermined predictability more generally, and had damaging effects, in particular for developing States.

47. It was pointed out that the current ISDS regime lacked adequate mechanisms to address concerns arising from multiple proceedings. It was pointed out that failing parties' agreement or in the absence of a particular doctrine or procedure, tribunals lacked the basis to take initiatives when faced with multiple proceedings. It was said that in further considering that matter, possible impact on party autonomy as well as the consensual nature of arbitration should be taken into account.

48. The view was expressed that reforms would be useful to provide a more predictable framework for addressing multiple proceedings, which would be in the interest of investors and States, and promote procedural efficiency, reliability and legitimacy. The need to address the negative consequences of multiple proceedings and recurring problems, such as contradictory and irreconcilable decisions was underlined.

49. It was pointed out that there existed a number of principles and mechanisms that could be applicable to prevent, or limit the impact of, multiple proceedings. References were made to the doctrines of *lis pendens*, *res judicata* and the use of consolidation, joinder and coordination mechanisms. However, it was also stated that their application was limited. For example, it was usually not possible to consolidate proceedings which have started under different arbitration rules and/or administered by different arbitration institutions. It was further said that consolidation of claims based on different underlying treaties could prove difficult because they might contain differing substantive obligations, as well as diverging time limits, procedural obligations and dispute settlement forums.

50. During the discussion, various mechanisms and tools that States have developed in their modern investment treaties were mentioned, thereby exemplifying the concerns of States. It was mentioned that treaty provisions had been drafted preventing abusive claims, prohibiting claims by shareholders where the investor itself was pursuing a remedy in a different forum, permitting claims by an investor only if the investor and the local company withdrew any pending claim and waived their rights to seek remedy before other forums, allowing consolidation, and limiting treaty shopping. It was suggested that such existing mechanisms and tools might be compiled for reference by States. It was further suggested that providing guidance to arbitral tribunals faced with multiple proceedings would be useful.

51. It was also mentioned that the majority of ISDS cases arose under investment treaties that did not include any provision to address multiple proceedings. Furthermore, it was said that the complexity of issues at stake in multiple proceedings made it difficult to address the matter solely in the context of investment treaties, and therefore a broader, holistic approach might be needed if the purpose was to create a fair and predictable ISDS regime. During the discussion, it was said that solutions developed by States and work by other international organizations should be taken into account to avoid duplication of efforts.

Decision by the Working Group

52. The Working Group completed its discussion related to the lack of a framework to address multiple proceedings.

53. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns related to the lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms.

3. Limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions

54. The Working Group then considered whether limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions made it desirable to undertake reforms.

55. It was pointed out that concerns expressed in this regard were intrinsically linked with concerns expressed about divergent interpretations by arbitral tribunals. It was also pointed out that these concerns covered the "correctness" of decisions as well as whether the existing mechanisms functioned properly to achieve consistent, coherent and correct outcomes.

56. As a general point, the Working Group was reminded that a key characteristic of arbitration was that it resulted in a final award, which by nature limited remedies against such awards.

57. On the meaning of "correct" decisions (including whether obtaining a correct outcome should be an objective of reform), it was mentioned that "incorrect" decisions would be those rendered where treaty provisions have been improperly interpreted by tribunals, not reflecting the intent of the parties to the treaty or contrary to the applicable rules of interpretation. It was also stated that decisions based on manifest errors of law or facts were also "incorrect", for which there was a lack of mechanism to rectify the situation. It was stated that ensuring correctness might generally assist in obtaining consistency of decisions as well.

58. It was pointed out that existing mechanisms (annulment and set aside) were designed to address significant deficiencies in the arbitral proceeding before an award was enforced. As such, post-award remedies were generally limited to this scope and did not necessarily provide the mechanism to address concerns arising from incorrect decisions or error made by arbitral tribunals. It was also pointed out that annulment committees and domestic courts were not necessarily qualified to rectify the outcomes. It was further mentioned that inconsistent decisions in the post-award stage further complicated the problem.

59. In addition to post-award remedies, emphasis was put on mechanisms during the arbitral proceedings to ensure and promote correctness of awards. References were made to non-disputing party submissions, submissions by third parties and joint interpretation committees, which were provided for in modern investment treaties. Reference was also made to the joint interpretative declarations by treaty parties, though their use had been limited. Further, the practice of scrutiny of awards by arbitral institutions was mentioned, which constituted a means to ensure correctness of awards without sacrificing the effectiveness of the proceedings.

60. Nonetheless, some doubts were expressed whether these developments sufficiently addressed the concerns particularly in light of the large number of existing treaties that did not include such mechanisms.

61. It was stressed that there was a need to raise awareness of the existing and newly developed mechanism to address the concerns. It was also stated that reference should be made to the provisions on third-party submissions in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and to reform efforts by ICSID, including with regard to such submissions. Yet, it was highlighted that the current reform being undertaken by ICSID did not include aspects relating to the

annulment mechanism, which would require an amendment of the ICSID Convention. It was suggested that the Working Group might wish to take note of these developments as it considered possible solutions in phase three of its mandate.

Decision by the Working Group

62. The Working Group completed its discussion with respect to mechanisms to address inconsistency and incorrectness of decisions.

63. The Working Group concluded that the development of reforms by UNCITRAL would be desirable to address concerns related to the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions.

C. Concerns pertaining to arbitrators and decision makers

64. The Working Group undertook its consideration of concerns pertaining to arbitrators and decision makers in ISDS, with a view to determining whether the relevant concerns warranted some form of reform, on the basis of documents A/CN.9/WG.III/WP.149 (paras. 11 to 13), A/CN.9/WG.III/WP.151 and A/CN.9/WG.III/WP.152.

65. The Working Group recalled its discussion at its thirty-fifth session on the question of decision makers in ISDS, including ethical requirements of decision makers, notably independence and impartiality, the impact of mechanisms for the constitution of tribunals, and the qualifications and powers of decision makers (A/CN.9/935, paras. 47–88).

1. Lack or apparent lack of independence and impartiality

66. The Working Group first considered concerns relating to the possible lack of independence and impartiality of decision makers, or of the perception thereof.

67. At the outset, it was emphasized that guaranteeing independence and impartiality of decision makers was crucial for ensuring due process, fairness, as well as the legitimacy of ISDS. Independence and impartiality were described as key elements of any system of justice, including arbitration. The concerns relating to the possible lack of independence and impartiality of decision makers, or of the perception thereof, were said to be particularly acute in the field of ISDS, as ISDS cases usually involved public policy issues and involved a State.

68. It was re-affirmed that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of decision makers, but also the appearance thereof. Therefore, it was said that any reform in that respect should aim at addressing both actual and perceived lack of independence and impartiality. The need for clear ethical standards was underlined.

69. It was mentioned that independence and impartiality were distinct, but closely related. It was pointed out that independence and impartiality were part of broader ethical requirements which also included other elements, such as adequate qualifications and competence, neutrality and accountability.

70. The Working Group discussed certain issues that were identified as potential causes of lack of independence and impartiality, and of the perception thereof, such as repeat appointments, instances of conflict of interest and/or so-called issue conflicts, as well as the practice of individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings (referred to as "double-hatting" below).

71. The fact that some arbitrators were commonly characterized as pro-State or pro-investor was also described as seemingly undermining the legitimacy of ISDS. Further, it was mentioned that dissenting opinions by arbitrators appointed by the losing party contributed to the overall perception of possible bias. It was said that repeat appointments were closely linked with the lack of diversity.

72. The Working Group also considered the practice of double-hatting. It was said that double-hatting raised concerns in that arbitrators had the possibility of deciding on, or appearing to decide on, an issue in one manner to benefit a party that they represented in another dispute. The Working Group was presented with statistics on the practice of double-hatting (see also para. 34 of document A/CN.9/WG.III/WP.152). It was indicated that the Court of Arbitration for Sport (CAS) and some private law firms had begun to prohibit that practice.

73. It was mentioned that improvements aimed at ensuring the independence and impartiality of decision makers were also being introduced by States in their investment treaties, as well as by international organizations active in the field of international investment agreements. In that light, it was said that, when considering possible solutions at a later stage, the Working Group should take into consideration the benefits and limitations of the existing framework and of the work carried out by States, international organizations, dispute resolution bodies and others involved in ISDS.

74. The Working Group turned its attention to the growing trend of including a code of conduct or ethical standards for decision makers in investment treaties and noted the ongoing efforts by States and international organizations in this regard. It was said that that trend evidenced the importance given to the matter by States as well as their underlying concerns. It was suggested that such codes of conduct or ethical standards could provide a basis for preparing a uniform code at a multilateral level. However, it was questioned whether additional work was required.

75. The view was expressed that any code of conduct would need to reflect diverse legal traditions and practices, and that it would be preferable to leave it to States to include in their investment treaties as well as to the disputing parties to determine the appropriate ethical standard. A different view was that a large number of existing treaties did not contain any standard on ethics, and that therefore a global solution was needed. Furthermore, it was said that development of a wide variety of rules on ethical standards might result in fragmentation and thus was not desirable in light of the need for a robust ethical standard that would ensure the legitimacy of ISDS.

76. During the discussion, reference was made to soft law standards that had been developed to complement investment treaties and applicable arbitration rules, including the IBA Guidelines on Conflicts of Interest in International Arbitration and the Guidelines on Party Representation in International Arbitration. Development of such guidance was described as a useful step forward and it was said that those instruments guided the conduct of decision makers in many current ISDS proceedings. It was also stated that more could be done particularly in the ISDS context including the preparation of a uniform code of ethics. In that context, it was recalled that the preparation of a code of ethics was on the agenda of UNCITRAL since its forty-eighth session, in 2015 (see also A/CN.9/855).

77. It was suggested that if a code of conduct were to be prepared at a multilateral level, it should be comprehensive, encompassing all issues related to decision makers including: independence and impartiality and other ethical requirements; conflict of interest and issue conflicts; double-hatting; disclosure requirements including relationships between decision makers and counsel; the protection of decision makers from undue pressure; challenge procedures; and possible sanctions in case of non-compliance. It was also suggested that ethical requirements should cover not only decision makers but also others involved in ISDS (including counsel and experts).

78. The Working Group recalled the suggestions made at its thirty-fifth session that the secretariats of ICSID and UNCITRAL might cooperate in developing such ethical requirements (see document A/CN.9/935, para. 64), and reiterated the importance of coordinated efforts among institutions to avoid any duplication and overlap. In that context, it was clarified that work was ongoing to provide the Working Group with background information which would facilitate its deliberations on possible preparation of a code of conduct jointly with ICSID.

79. A question was raised whether the preparation of a code of conduct to apply in the current ISDS regime would sufficiently address the concerns identified, notably as regards the effective implementation of the requirements concerned. It was suggested that a more systemic reform of an institutional nature might be necessary, itself raising the need to ensure that decision makers would be free of political interference. The need for a truly impartial ISDS regime was underlined.

80. It was also suggested that questions relating to third-party funding should also be discussed in this context. Reference was made to the report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration.

81. It was noted that views were expressed on some of the causes of the concerns with respect to independence and impartiality — with some highlighting the lack of clear standards in many existing particularly older treaties, others highlighting specific practices like double-hatting, and others pointing to the ad hoc system of party-appointed tribunals. In that light, it was stated that consideration should be given on how any proposed reforms would address the identified cause of the concerns.

Decision by the Working Group

82. The Working Group completed its discussion with respect to the lack or the apparent lack of independence and impartiality of decision makers in ISDS.

83. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS.

2. Limitations in existing challenge mechanisms

84. Based on the above conclusion, the Working Group then considered whether it would be desirable for UNCITRAL to develop reforms to respond to concerns relating to the adequacy, effectiveness and transparency of disclosure and challenge mechanisms available under existing treaties and arbitration rules.

85. It was noted that the Working Group had at its earlier sessions discussed concerns about the adequacy, effectiveness and transparency of such disclosure and challenge mechanisms in some detail. On that basis, it was suggested that improvements would be desirable to address those concerns.

86. It was generally felt that there was a need to increase the transparency of the challenge procedure and reference was made to the proposed amendments to ICSID Rules, which would require the publication of decisions or orders on challenges. It was also mentioned that balance should be sought when developing any solution between the transparency requirements and the confidential aspects of arbitration.

87. It was also suggested that one way of ensuring the effectiveness of the challenge mechanisms was to introduce time limits as well as penalties/sanctions for abusive or frivolous challenges. However, it was also stated that the potential impact of such measures, which could include discouraging well-founded challenges, would also need to be taken into account. Consequently, it was said, a balance should be sought between achieving effectiveness and preserving the rights of disputing parties to make challenges.

88. A number of other elements to be taken into account when considering possible solutions were mentioned, including the disclosure requirements, criteria for applying for disqualification, at what stages of the proceedings challenges could be made, who would make the decisions regarding the challenge, the criteria to be employed in reviewing such challenges, the potential impact of the challenge on the overall cost and duration of the arbitral proceedings, as well as the extent to which relevant information about the challenge and decision was to be made public.

Decision by the Working Group

89. The Working Group completed its discussion regarding the disclosure and challenge mechanisms and their limitations.

90. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns relating to the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules.

3. Lack of diversity of decision makers

91. The Working Group considered concerns expressed that the existing mechanisms in many investment treaties for constituting ISDS tribunals were not sufficient to ensure diversity of decision makers and whether those concerns warranted some type of reform.

92. The view was generally shared that the current lack of diversity in decision makers in the field of ISDS contributed to undermine the legitimacy of the ISDS regime. Relevant statistics provided by the Secretariat and presented during the session illustrated that there was indeed lack of diversity particularly in terms of gender and geographical representation. It was, however, emphasized that diversity included broader considerations, for example, in terms of age, ethnicity, language, legal background as well as the country of origin, reflecting the different stages of economic development. In that context, it was stated that promotion of diversity would ensure that decision makers had a better understanding of the policy consideration of States (particularly developing States), of local laws and practice as well as of public international law. It was stated that those aspects were closely related to the qualification of decision makers. In that context, it was mentioned that promotion of diversity should be understood in the broader context of providing equal opportunity to individuals belonging to all groups and minorities.

93. As to the cause of the lack of diversity, it was pointed out that the current ad hoc mechanisms for the constitution of tribunals could be one source. It was also stated that when parties selected decision makers, they usually placed a lot of emphasis on the expertise and experience of decision makers, which usually resulted in a very limited number of individuals being appointed. On the other hand, it was indicated that some States had succeeded in diversifying their appointments, including by appointing first-time arbitrators. It was also stated that the current party-driven appointment mechanism limited the involvement of arbitral institutions in addressing the lack diversity. Nonetheless, it was stressed that arbitral institutions had a role to play, and some were actively increasing the pool of decision makers in the ISDS proceedings they administered, particularly from under-represented groups. It was also suggested that arbitral institutions could take the initiative to limit the number of appointments of the same individuals. The need for training of potential decision makers and for capacity-building was also mentioned.

94. The Working Group took note of efforts being made by States as well as arbitral institutions to address the lack of diversity as well as existing tools that could be utilized by States. For example, it was mentioned that the panel of arbitrators in ICSID was one way of diversifying the pool of potential arbitrators. It was stated that gradual improvements were being made at both ICSID and PCA.

95. A number of statements indicated that States, when exercising their sovereign right to choose arbitrators as respondents of ISDS claims, had a significant role to play in diversifying arbitrators they appointed in ISDS cases. In a similar context, the need for both States and investors as well as their counsel to take diversity into account in appointing arbitrators was highlighted. However, it was also pointed out that under the current ad hoc system, that would be difficult as disputing parties viewed the ability to appoint arbitrators as an element in ensuring a successful outcome of the dispute. As such, the need for a multilateral or a systemic approach was suggested to ensure diversity in the ISDS regime.

96. It was also mentioned that seeking diversity should not be at the expense of experience, competence and quality. Moreover, it was mentioned that addressing lack of diversity should be an inclusive effort so that increasing greater representation by one group did not result in the marginalization of another group of individuals.

Decision by the Working Group

97. The Working Group completed its discussion of the concerns with respect to lack of diversity in ISDS.

98. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL in order to respond to concerns about the lack of appropriate diversity among decision makers in ISDS.

4. Qualifications of decision makers

99. The Working Group considered the question whether it would be desirable for UNCITRAL to develop reforms in order to respond to concerns that the existing mechanisms for constituting ISDS tribunals in existing investment treaties and arbitration rules were not sufficient to ensure that decision makers in ISDS have the appropriate qualifications to decide the cases before them.

100. The Working Group recalled its preliminary discussion on the topic at its thirty-fifth session, where diverse views had been expressed.

101. Views were reiterated that existing mechanisms for constituting ISDS tribunals were based on party autonomy and designed to ensure flexibility and that those were key features of arbitration, which made it attractive. Party appointment was referred to as a fundamental right of disputing parties in arbitration, and one of the main reasons parties agreed to submit their dispute to arbitration. It was said that the mechanism for constituting arbitral tribunals allowed parties to choose the arbitrators that they considered most qualified for solving their disputes and that, in practice, parties seldom delegated their right to participate in the constitution of ISDS tribunals. Furthermore, it was pointed out that there was a vast amount of publicly available information on arbitrators, including reputation, technical skills, language abilities and approach to the arbitral process in general, which allowed parties to decide on the most appropriate decision maker for their case.

102. It was suggested that there was nevertheless a need to enhance the current mechanisms for constituting ISDS tribunals, in particular to address the concerns relating to lack of transparency, lack of diversity in appointed decision makers, repeat appointments, and qualification of decision makers. It was suggested that guidelines could be developed for parties to follow in identifying and appointing decision makers. It was also felt that insufficient information about the constitution of ISDS tribunals resulted in limited accountability of the system. In that light, it was mentioned that arbitral institutions could be tasked with a greater role regarding the constitution of ISDS tribunals, for instance, by ensuring that appointments were more transparent, and by limiting multiple appointments of the same individuals. It was suggested that a pragmatic approach to deal with those identified concerns would be useful.

103. It was also noted that the constitution of ISDS tribunals at times involved the intervention of an appointing authority. In that context, the important role played by appointing authorities (both directly and indirectly) in constituting ISDS tribunals was highlighted and reference was made to the OECD Consultation Paper on Appointing Authorities and the Selection of Arbitrators in ISDS. The efforts by PCA to provide information on its role as appointing authority in ISDS cases (including factors considered in making appointments, which generally corresponded to the expectation of the disputing parties) as well as relevant statistics being prepared were noted. However, it was also said that there were certain limitations in disclosing information about the composition of ISDS tribunals; for example, under the UNCITRAL

Arbitration Rules, it was left to the agreement of the disputing parties or the tribunal's decision unless transparency was mandated by the treaty.

104. Views were expressed that the concerns under consideration were closely linked to other concerns, such as the lack or apparent lack of independence and impartiality of decision makers. It was also pointed out that appointed decision makers might not necessarily possess sufficient knowledge of public policy considerations in ISDS cases or of public international law.

105. In that light, it was questioned whether constituting ISDS tribunals based on party autonomy was that fundamental a characteristic of the ISDS regime. It was pointed out that, for instance, at the stage of annulment or setting aside of arbitral awards, the parties were not involved in choosing the decision maker. It was also mentioned that, in designing reform, the key feature that should be sought and preserved was the effective resolution of investment disputes through a fair and due process. In that light, it was suggested that reform of the existing mechanisms for constitution of ISDS tribunals could be envisaged, such as appointment through an independent body.

106. It was generally felt that even under the current mechanisms of party appointment, reforms were necessary as mentioned above. Those expressing concerns about the party-appointment mechanism expressed the need for reform of a more fundamental nature. Consequently, there was consensus in the Working Group with regard to the need for reform, while differing views about the extent of reform were duly noted.

Decision by the Working Group

107. The Working Group completed its discussions with respect to the existing mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.

108. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.

D. Concerns pertaining to cost and duration of ISDS cases

109. The Working Group undertook its consideration of concerns pertaining to cost and duration of ISDS proceedings with a view to determining whether relevant concerns warranted some form of reform, on the basis of documents A/CN.9/WG.III/WP.149 (paras. 14 to 16) and A/CN.9/WG.III/WP.153.

1. Lengthy and costly ISDS proceedings and the lack of a mechanism to address frivolous or unmeritorious cases

110. The Working Group first considered whether concerns expressed with regard to the cost and duration of ISDS proceedings including the lack of a mechanism to address frivolous or unmeritorious cases under some investment treaties and arbitration rules warranted some type of reform.

111. Concerns expressed during the previous sessions of the Working Group with regard to cost and duration of ISDS proceedings were reiterated. The resource-intensive nature of ISDS proceedings, where respondent States and claimant investors alike had to devote extensive time and cost, was highlighted. It was stated that costs were particularly significant for developing States with scarce financial and human resources and that ISDS proceedings were often accompanied with significant reputational harm and the risk of undue regulatory chill. It was also mentioned that the high cost of ISDS cases were of particular concern to small and medium-sized enterprises with limited financial resources, which might limit their ability to access ISDS.

112. It was, however, noted that length and cost of ISDS proceedings might be the consequence of a number of other concerns that the Working Group had identified previously and that a number of issues were interlinked.

113. The deliberation of the Working Group was based on statistical data provided by the Secretariat and those presented during the session. To complement the comparative analysis provided in document A/CN.9/WG.III/WP.153 (paras. 66–75), relevant data on cost and duration of inter-States arbitration proceedings administered by PCA was provided along with possible factors that influenced the duration of those proceedings.

114. The Working Group recalled that a number of elements contributing to the cost and duration of ISDS proceedings had been identified by the Working Group (see documents A/CN.9/WG.III/WP.149, para. 17 and A/CN.9/WG.III/WP.153, paras. 76–92). In addition, it was indicated that the following might have an impact on the cost and duration of the ISDS proceedings: (i) application of provisional/interim measures by investors; (ii) bifurcation of proceedings; (iii) challenges to arbitrators; (iv) multiple appointments of arbitrators; (v) the need for translation; and (vi) delays in the rendering of the award. It was also reiterated that respondent States might require additional time to prepare for ISDS proceedings as they would need to coordinate among relevant stakeholders and, in certain cases, engage external counsel and experts to readily prepare for the case.

115. Noting that party cost (for example, fees paid by parties to their counsel) constituted a significant portion of the overall cost and that appointment, discovery or document production and rendering of the award were the most time-consuming stages in ISDS proceedings, it was stated that efforts could be made to address such aspects.

116. Having examined some of the reasons leading to length and cost of ISDS proceedings, it was said that there was a need to distinguish factors: (i) that were outside the control of the parties or could not be addressed in any reform (for example, complexity of the case, the need for translation and strategies by disputing parties); (ii) that were being addressed through improvements in procedural rules (for example, introduction of time frames and expedited procedure); and (iii) that needed a more systemic reform (for example, lack of a rule of precedent and ad hoc appointments).

117. While it was generally felt that it would be desirable to undertake reforms to improve the efficiency of ISDS, the need to strike an appropriate balance was also stressed. For example, it was emphasized that ensuring due and fair process as well as guaranteeing the quality and correctness of the outcomes should not be sacrificed for the sake of speedy resolution of ISDS.

118. The Working Group also discussed a wide range of possible mechanisms to improve the efficiency of ISDS that were being introduced by States and institutions. During the discussion, a number of references were made to mechanisms included by States in their modern treaties and to significant reform efforts under way by ICSID to tackle concerns regarding cost and duration in the proposed amendments to the ICSID Rules (see document A/CN.9/WG.III/WP.153, para. 101) with the aim to streamline the proceedings while seeking to ensure balanced improvements. While references were made to expedited procedures for low-value claims and stricter timelines, it was also mentioned that those measures might not be practicable for States particularly when they needed more time to prepare their cases. However, the need for all parties as well as the tribunal to abide by the established timeline was stressed. In addition, references were made to the following mechanisms (though not exhaustive): preventive or pre-emptive approaches, use of dispute resolution means other than arbitration such as mediation, establishing a budget at the outset with constant updates, setting a ceiling for overall costs, better case management, cost disincentives for frivolous claims and applications, prohibition of frivolous interim measure application, limitations on double-hatting (eventually leading to reduced number of challenges), statute of limitation on investor claims, early dismissal mechanism for frivolous or unmeritorious claims, limitations on standing, and

narrowing the causes of actions that investors could bring a claim (as provided for in the United States-Mexico-trade agreement).

119. References were also made to the potential benefits of setting up an advisory centre to assist States faced with difficulties in ISDS proceedings particularly with regard to cost. It was suggested that providing financial aid to developing countries should also be considered. In that context, reference was made to a study being conducted on securing adequate legal defence in proceedings under investment agreements. In addition, suggestions were made that such an advisory centre could provide training for decision makers.

120. During the deliberation, concerns were expressed with regard to the practice of third-party funding in ISDS as having an impact on the cost and duration of ISDS proceedings. It was stated that third-party funding also had an impact on other aspects of ISDS that the Working Group had decided that reforms would be desirable. It was also said that third-party funding introduced a structural imbalance in the ISDS regime as respondent States generally did not have access to it. In that context, measures being introduced by States and institutions (including ICSID) to address concerns expressed about third-party funding were mentioned.

121. While it was suggested that reforms should focus on addressing excessive and unjustified cost and duration, it was stated that even justified cost and duration posed a heavy burden on the disputing parties and that such characterization of the concern could limit the consideration by the Working Group of options to improve the efficiency of the ISDS proceedings. With respect to the suggestion that a more systemic and holistic approach would be necessary as a number of concerns were interlinked, it was mentioned there could be merit in adopting a number of the ongoing reform efforts in a more systemic manner.

Decision by the Working Group

122. The Working Group completed its discussion on concerns with respect to the cost and duration of ISDS proceedings including the lack of a mechanism to address frivolous or unmeritorious claims.

123. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to cost and duration of ISDS proceedings.

2. Allocation of costs in ISDS

124. The Working Group then considered whether concerns expressed with regard to allocation of cost by arbitral tribunals in ISDS warranted some type of reform. The Working Group took note of the existing approaches and relevant rules on allocation of cost.

125. With respect to the question whether the identified concerns deserved reform by UNCITRAL, it was generally felt that there was a need to consider the adequacy of the relevant rules on cost allocation and how arbitral tribunals in ISDS were applying those rules. It was suggested that if tribunals took into account the behaviour of the parties in allocating cost, it could have a positive impact in reducing overall costs.

126. The difficulty and inconsistency in allocating costs in proportion to the success of the disputing parties was highlighted and it was stated that guidance to tribunals on allocating costs would be useful on, for instance, when to depart from the default rule, when and how to take into account party behaviour and third-party funding.

Decision by the Working Group

127. The Working Group completed its discussion on concerns with respect to allocation of costs by arbitral tribunals in ISDS and concluded that it was desirable that reforms be developed by UNCITRAL to address those concerns.

3. Concerns regarding the availability of security for cost in ISDS

128. The Working Group considered whether it would be desirable for UNCITRAL to develop reforms to address the concerns related to limited availability of security for costs in ISDS in light of difficulties faced by States in recovering costs.

129. It was noted that ISDS tribunals seldom ordered security for costs and had done so in very exceptional circumstances, despite the fact that certain arbitration rules provided for that possibility. It was generally felt that, as a result, respondent States had not been able to recover a substantial part or any of their costs in defending unsuccessful, frivolous or bad faith claims by investors.

130. During the discussion, it was pointed out that investors had also used shell companies, or became impecunious, making cost recovery by States impossible. That issue was highlighted as exemplifying the imbalance between parties, because States, given their permanence, were in a different position from investors, who might be unwilling or unable to pay. Therefore, concerns regarding the availability of security for costs were widely shared.

131. It was suggested that the availability of security for costs might assist in the early dismissal of frivolous claims. It was, however, cautioned that, ordering security for cost should not in any way limit the possibility for small and medium-sized enterprises to access ISDS and that a balanced approach should be adopted, taking into account different interests at stake.

Decision by the Working Group

132. The Working Group completed its discussion with respect to the difficulties faced by successful States to recover some or all of their costs from claimant investors, and the need for rules on security for cost.

133. The Working Group concluded that it was desirable that reforms be developed by UNCITRAL to address concerns with respect to security for cost.

4. Concerns regarding third-party funding

134. Regarding third-party funding, the Working Group took note of a number of observations made including concerns expressed on the matter at its current session (see para. 120 above). Noting that the Secretariat was preparing a background note on the topic, the Working Group decided to consider whether it would be desirable for UNCITRAL to undertake reform on that matter at its next session.

E. Organization of work at the forthcoming session

135. The Working Group noted that it had completed its review of the three broad categories of concerns laid out in document A/CN.9/WG.III/WP.149, as further explored in documents A/CN.9/WG.III/WP.151, A/CN.9/WG.III/WP.152 and A/CN.9/WG.III/WP.153. The Working Group further noted that it had decided on the desirability of developing reforms in UNCITRAL with respect to those concerns.

136. The Working Group considered how it would conduct its work at its forthcoming session. The Working Group agreed that it would first consider the concerns related to third-party funding (see para. 134 above).

137. The Working Group took note that it would then have to consider, as indicated in paragraph 17 of document A/CN.9/WG.III/WP.149, other concerns not covered by the broad categories of desirable reforms already identified. In that context, governments that wished to raise additional concerns were encouraged to submit them in writing before the next session.

138. The Working Group agreed that next it would have to develop a work plan to address the concerns for which it had decided that reform by UNCITRAL was desirable.

139. It was suggested that before getting into discussion on solutions, governments should: (i) identify specific elements or aspects of the three broad categories of concern, and (ii) assign levels of priority among such identified elements or aspects. On the other hand, it was said that the Working Group should work on comprehensive reform and use prioritization as a tool to order the work of the Working Group but not to miss out on areas of reform. It was agreed that, instead of pursing the discussion at this session, this would be further discussed at the next session.

140. Reflecting the government-led process in the Working Group, governments were encouraged to consult and submit written proposals for the development of the workplan in time for the next session. It was noted that the workplan would address: (i) how some or all of the concerns that the Working Group identified as desirable for reform should be addressed in phase three of the mandate, and (ii) questions such as sequencing, priority, coordination with other organizations, multiple tracks, ways to continue the work between sessions of the Working Group, and any other matter that the Working Group considered necessary. The Secretariat was also requested to prepare a note on the options available to facilitate the work plan developed by the Working Group.

141. It was also emphasized that at its forthcoming sessions, the Working Group would pursue an in-depth consideration of the issues involved, allowing sufficient time for governments to provide input. The Working Group would also seek to be efficient and effective in making progress in its deliberations and in building consensus on reform options. Those deliberations would encompass all options for reform that the Working Group wished to explore and would also benefit from expert input from all stakeholders.

142. The Working Group recalled the importance of inclusivity in its process, and of a wide and active participation by both developing and developed States in its sessions, so as to ensure that the Working Group was able to benefit from high-level input from all governments in discharging its mandate. In that context, it was recalled that the European Union as well as the Swiss Agency for Development and Cooperation had provided contributions to the UNCITRAL trust fund, in order to allow participation of developing States in the deliberations of the Working Group. Delegations were invited to consider making further contributions to allow for inclusive attendance at future sessions of the Working Group.